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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9                   VALERIE D. JOHNSON,

10                  Plaintiff,

11                  v.

12                  JENNY YANG, Chair, Equal Employment  
13                  Opportunity Commission,

14                  Defendant.

Case No. C15-167RSL

ORDER GRANTING MOTION TO  
DISMISS

15  
16                   **I. INTRODUCTION**

17                  This matter comes before the Court on “Defendant’s Motion To Dismiss.” Dkt. # 8.

18                  Having reviewed the memoranda and exhibits submitted by the parties, the Court finds as  
19 follows.

20                   **II. DISCUSSION**

21                  Plaintiff is an employee of the United States Equal Employment Opportunity Commission  
22 (“Commission” or “EEOC”) who has filed suit against defendant alleging that the Commission  
23 discriminated against her because of her race and retaliated against her for protected activity, in  
24 violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq. (“Title VII”). Plaintiff  
25 filed an administrative EEO complaint on January 7, 2015, Dkt. # 9 (Murphy Decl.) ¶ 3, and  
26 filed this action on February 5, 2015, Dkt. # 1 (Compl.).

1 Plaintiff has not exhausted her administrative remedies, which is a precondition to filing  
 2 suit under Title VII. See, e.g., Lyons v. England, 307 F.3d 1092, 1103 (9th Cir. 2002);  
 3 Vinieratos v. United States Dep't of Air Force ex rel. Aldridge, 939 F.2d 762, 769 (9th Cir.  
 4 1991). Under 29 C.F.R. § 1614.407, after filing an EEO complaint, a plaintiff must wait a  
 5 minimum of 180 days before filing suit in district court unless the Commission issues a final  
 6 action on her complaint within that timeframe.<sup>1</sup> Once a party appeals to a statutory agency,  
 7 board or commission, the appeal must be exhausted; “impatience with the agency does not  
 8 justify immediate resort to the courts.” Rivera v. United States Postal Service, 830 F.2d 1037,  
 9 1039 (9th Cir. 1987). Plaintiff filed this action within 30 days of filing her EEO complaint, and  
 10 no final decision has been issued regarding the latter, Dkt. # 9 (Murphy Decl.) ¶ 4 (plaintiff’s  
 11 claims have not yet even been investigated). Thus, plaintiff has failed to exhaust her  
 12 administrative remedies. While the exhaustion requirement is subject to equitable modification,  
 13 see, e.g., Thompson v. Holder, 2014 WL 584884, at \*2 (D. Nev. Feb. 11, 2014), the Court finds  
 14 no equitable reason not to apply § 1614.407 in this case.

15 Plaintiff suggests that her current claims should be exempt from the above exhaustion  
 16 requirement because, according to plaintiff, they are related to retaliation claims that she  
 17 previously raised in this District and that were dismissed without prejudice in 2011. Dkt. # 12  
 18 (Pl. Resp.) at 3. In her previous action, plaintiff alleged that the Commission breached a 2006  
 19 settlement agreement between the parties by refusing to give her priority consideration for a  
 20 position as a mediator in the Commission’s Seattle office, Johnson v. E.E.O.C., C09-1867JCC

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21 <sup>1</sup> The regulation states the following:

- 22 A complainant who has filed an individual complaint . . . is authorized under title VII . . .  
 23 to file a civil action in an appropriate United States District Court:  
 24 (a) Within 90 days of receipt of the final action on an individual or class complaint if no  
 25 appeal has been filed;  
 26 (b) After 180 days from the date of filing an individual or class complaint if an appeal has  
 27 not been filed and a final action has not been taken;  
 28 (c) Within 90 days of receipt of the Commission's final decision on an appeal; or  
 29 (d) After 180 days from the date of filing an appeal with the Commission if there has  
 been no final decision by the Commission.

29 C.F.R. § 1614.407.

1 (W.D. Wash. Dec. 31, 2009) (Dkt. # 1) (Compl.); plaintiff argued that the Commission's conduct  
2 was discriminatory and retaliatory, Johnson v. E.E.O.C., 2011 WL 814320, at \*2 (W.D. Wash.  
3 Mar. 2, 2011); Johnson, C09-1867JCC (W.D. Wash. Feb. 22, 2011) (Dkt. # 53 at 7) (Pl. Brief)  
4 (arguing Commission breached the agreement and retaliated against plaintiff by terminating her  
5 temporary assignment to the mediation unit). Here, plaintiff alleges that, after complaining  
6 about a subsequent breach of the agreement in 2014, she was appointed to this position in order  
7 to resolve this dispute, and that she subsequently faced discrimination and was retaliated against  
8 for complaining about the breach. Dkt. # 3 (Am. Compl.) at 2. According to plaintiff, this  
9 action seeks to "resurrect" her previous civil action in light of the Commission's more recent  
10 retaliatory conduct. Dkt. # 12 at 3-5; see Dkt. # 3 (Am. Compl.) at 2-3.

11       The Court finds plaintiff's argument unsupported and unpersuasive, and it finds no  
12 authority or evidence indicating that plaintiff's claims have been exhausted (or that exhaustion is  
13 not required). While it mentions her previous action, the Complaint here only alleges Title VII  
14 violations related to events occurring in 2014, years after the conduct giving rise to her previous  
15 suit. Dkt. # 3 (Am. Compl.) (violations followed her new complaint about a breach and  
16 subsequent appointment as a mediator). Ninth Circuit precedent indicates that, in some  
17 circumstances, claims arising after the filing of an EEO complaint need not be separately  
18 exhausted. B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1100 (9th Cir. 2002) (new allegations  
19 of discrimination not included in an administrative charge may be considered if they are like or  
20 reasonably related to claims in the charge that will be properly exhausted, or fall within the  
21 scope of an EEOC investigation that reasonably could be expected to grow out of the charged  
22 allegations). However, even assuming arguendo that plaintiff's previous retaliation claims were  
23 properly exhausted, plaintiff's current action concerns a distinct pattern of discriminatory and  
24 retaliatory conduct, and thus her current claims should be properly exhausted before she can  
25 raise them in this forum. Cf. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-13  
26 (2002) (indicating that plaintiffs must exhaust their administrative remedies for each "discrete")  
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1 incident of discrimination or retaliation that rises to the level of an unlawful employment  
2 practice).

3 **III. CONCLUSION**

4 For all of the foregoing reasons, the Court GRANTS defendant's motion to dismiss. Dkt.  
5 # 8. The Court DISMISSES this action without prejudice. Accordingly, defendant's  
6 outstanding motion to stay is DENIED as moot. Dkt. # 10.

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8 DATED this 1st day of June, 2015.

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11 Robert S. Lasnik  
12 United States District Judge